Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-740

In The

Supreme Court of the United States

October Term, 1988

W. VICTOR MADEJ,

Petitioner,

v.

AIR PRODUCTS & CHEMICALS, INC.,

Respondent.

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT

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November 29, 1988

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SUMMARY OF ARGUMENT

This case is not properly before this Court. The petition for writ of certiorari should be denied for the following reasons: Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) yet the case never went to a Court of Appeals; rather, final judgment was rendered by the Supreme Court of Pennsylvania. As a result, petitioner has not correctly invoked this Court's jurisdiction.

Under Supreme Court Rule 17.1, this Court should not grant the petition since the Pennsylvania Supreme Court did not decide a federal question in any way in conflict with a decision of another state court of last resort or a federal Court of Appeals. Further, the Pennsylvania Supreme Court did not decide an important question of federal law which has not

been, but should be, settled by this Court, nor did it decide a federal question in a way in conflict with applicable decisions of this Court.

The constitutional issue raised and argued in the petition was never raised at the trial court level. Even if that issue had been raised at the trial court, which twice considered this case, petitioner's appeal to the Pennsylvania appellate courts was limited to two other issues, neither of which involved a constitutional or federal question.

In short, petitioner cites no valid reason under Supreme Court Rule 17 as to why the petition should be granted.

The petition should also be denied for failure to comply with Supreme Court Rules 21.1(g), (h) and (j), 20 and 28.2. Petitioner's statement of the case fails to set forth with specificity the stage in the proceeding at either the trial or

appellate levels at which any federal question sought to be reviewed was raised, the method or manner by which the federal question was raised as well as the court decision relating thereto, and pertinent quotations of specific portions of the record or summaries thereof where the matter appeared. Lastly, petitioner fails to establish why his proposed federal question is timely and properly raised so as to confer jurisdiction upon this Honorable Court to review the judgment on a writ of certiorari.

The petition in this case was originally untimely filed on September 26, 1988, more than ninety (90) days following the Supreme Court of Pennsylvania's denial of appeal on June 22, 1988 which violates Supreme Court Rule 20. Petitioner's attempt to correct this error consisted of the filing of a notarized statement by Attorney Richard

J. Orloski. That statement reveals that Attorney Orloski did not personally observe petitioner mail the petition to the Clerk of the Supreme Court of the United States; to the contrary, the entire basis for Attorney Orloski's statement was information supplied by petitioner himself. This is not sufficient under Rule 28.2.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE THE CASE IS NOT PROPERLY BEFORE THE SUPREME COURT OF THE UNITED STATES.

At the outset, Respondent[1] contends that petitioner has failed to state proper grounds upon which the jurisdiction of this Honorable Court may be invoked. In his petition at page vii, petitioner states that the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). That section provides for review of cases in the Court of Appeals. The last appellate court to affirm the judgment of the trial court in this matter was the Pennsylvania Supreme Court (see petition at page vii and 34). Due to the failure to properly invoke the juris-

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[1]Supreme Court Rule 28.2 listing: Respondent, Air Products & Chemicals, Inc. is a parent company of a number of wholly owned subsidiaries.

diction of this Court, the petition for writ of certiorari should be denied.

An additional reason why the petition should be denied is that none of the reasons normally considered under Supreme Court Rule 17.1 for review of a petition for writ of certiorari apply in this case. Rule 17.1(a) is inapplicable since no federal court of appeals has ever rendered a decision in this case. Rule 17.1(b) is inapplicable since the state court of last resort, in this case the Pennsylvania Supreme Court, never decided any federal question in this case. Similarly, Rule 17.1(c) is inapplicable since the Pennsylvania Supreme Court did not decide any question whatsoever regarding federal law.

Moreover, the constitutional issue petitioner now attempts to raise was never pled by petitioner nor was it ever

argued or considered by the trial court in either of its opinions. (see petition pages 18-29). Further, petitioner never appealed from the order of the trial court granting the demurrer of respondent to the count of petitioner's Complaint (Count IV) which he now cites as the source of his constitutional argument based on free speech. (see petition pages 5, 18-29, and 31). This count alleged that petitioner's dismissal was a violation of public policy. The general, well established rule is that a federal appellate court, and the Supreme Court of the United States in particular, should not consider an issue not passed upon, raised or resolved in the lower court. California v. Taylor, 353 U.S. 553, 557 n.2, 77 S.Ct. 1037, 1039-40, 1 L.Ed. 2d 1034, 1037 (1957). In the instant case, petitioner not only failed to plead or argue his constitutional

claim at the trial court level so that the trial court never passed on the issue, but also failed to preserve his right to appeal that issue through Pennsylvania's appellate courts. He should not now be permitted to raise the issue for the first time before this Honorable Court.

II. THE PETITION FOR A WRIT OF CERTIORARI MATERIALLY FAILS TO CONFORM TO SUPREME COURT RULES 20, 21 and 28.2.

The petition specifically fails to conform with Supreme Court Rule 21.1(h) in the following respects: Petitioner seeks review of the judgment of a state court, but his statement of the case fails to specify the stage in the proceedings, both in the court of first instance and in the appellate courts, where the federal question sought to be reviewed before this Court was raised. The "federal question" in this case,

which petitioner characterizes as a constitutional issue of free speech, was in fact first raised and argued before the Superior Court of Pennsylvania to which petitioner had appealed from the rulings by the trial court. (see petition page 31). The free speech issue was not properly pleaded or argued before, nor was it ever considered by, the trial court. Indeed, petitioner did not even properly appeal that issue when represented by counsel as noted by the Superior Court. (see petition, page 31).

Perhaps for the above reason, petitioner also conveniently fails in his statement of the case to specify the method or manner by which he raised the "federal question" and the way in which it was passed upon by the Pennsylvania appellate courts. He also fails to cite any pertinent quotations of specific portions of the record and he fails to

provide a summary thereof with specific reference to the places in the record where the matter appears. Most importantly, he fails to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on petition for writ of certiorari.

The petition also violates Supreme Court Rule 21.1(j) in that the argument does not amplify any reasons relied upon for the allowance of the writ as provided in Rule 17. Reference is hereby made to the first section of the Respondent's argument.

Under Supreme Court Rule 20, the petition in this case had to be submitted on or before September 20, 1988 which was 90 days following the Supreme Court of Pennsylvania's denial of appeal on June 22, 1988. In fact, the petition was received by the clerk on September 26,

1988 and was returned to petitioner not docketed.

Subsequently, petitioner resubmitted his petition with a notarized statement under Supreme Court Rule 28.2 signed by Attorney Richard J. Orloski. That statement reveals that Attorney Orloski swore that petitioner timely mailed his petition based solely on information supplied to him by petitioner. Orloski did not observe petitioner mail the petition and states only that he believes petitioner's statement to him that he timely mailed the petition.

Rule 28.2 specifically requires that the notarized statement set forth the details of the mailing and that the statement be based on the "knowledge" of the attorney/affiant. This certainly was not the case in the instant situation. Supreme Court Rule 28.2 requires some

independent personal knowledge of the attorney, not a statement based totally on information supplied by the petitioner. Accordingly, the petition should be denied for failure to comply with Rules 20 and 28.2.

III. CONCLUSION

For all of the above reasons, it is respectfully requested that the petition for a writ of certiorari in this case be denied.

Respectfully submitted,

FRANK, FRANK, PENN &
BERGSTEIN, P.C.

By: _____

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CERTIFICATE OF SERVICE

I, Steven A. Bergstein, Esquire, hereby certify that, at my direction, forty (40) true and correct copies of Respondent's Brief were sent on November 29, 1988 by Federal Express to:

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Three (3) copies of same were mailed by First Class Mail to:

W. Victor Madej
3355 Birch Circle
Allentown, PA 18103

Steven A. Bergstein

Dated: November 29, 1988

No. 88-740

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OF THE UNITED STATES
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W. VICTOR MADEJ,

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Respondent

PRAECIPE FOR APPEARANCE

TO THE CLERK OF SAID COURT:

Sir:

Enter my appearance for Respondent, Air Products & Chemicals, Inc., in the above case.

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Date: November 29, 1988